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No. 03-1647

In the Supreme Court of the United States

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
Petitioner,

v.

WAYNE TURNER, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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The brief in opposition filed by Wayne Turner, *et al.*, ("Turner") is principally devoted to discussing irrelevant facts and general legal principles that are not at issue in this case. Turner fails even to address this Court's jurisprudence ruling that Congress, in enacting federal fee-shifting statutes, did not intend to give the rights and interests of prevailing plaintiffs' hegemony over all other competing rights and interests. Turner also fails to rebut the analysis by the District of Columbia Board of Elections and Ethics ("the Board") which demonstrates that there is a square conflict among the Circuits over whether district courts have discretion to apportion fees when the prevailing plaintiff has suffered an indivisible injury and when one responsible party is immune or otherwise excused from fee liability.

I. The Court Should Ignore Turner's Attempts to Obfuscate the Clear Legal Conflict Among the Circuits.

Much of Turner's Opposition is devoted to red herrings. For the reasons that follow, this Court should spurn Turner's attempts to divert it from the real issue.

Turner repeatedly urges that the Board has overlooked 42 U.S.C. § 1983 and the cases which hold that local governments and officials may be held responsible for enforcing laws not of their own making. Opp. 1, 7-10, 14, 24, 26, 28-29. This is simply not true.

To the contrary, what Turner fails to understand is that enforcement is merely the necessary predicate for fee liability. It does not preclude a district court from exercising its discretion to apportion fees according to a defendant's relative responsibility for a constitutional violation and/or according to the relative time a prevailing plaintiff spent litigating against various defendants. If the Board had done nothing more than enforce the Barr Amendment, it would not be seeking relief in this Court. Here, however, the Board aligned itself with Turner from the outset of the litigation and together they secured an order allowing the Board to complete the election process with respect to Initiative 59.

Further, the Board has accepted responsibility for the fees the district court awarded in the exercise of its discretion. The Board thus stands in precisely the same posture as other non-federal defendants which have paid less than the full amount of fees courts have determined were properly awardable to a prevailing plaintiff. *See, e.g.*, *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981). The fact that municipalities and municipal agencies may be held

responsible for constitutional violations for enforcing laws not of their own making does not preclude a district court from taking into account relative responsibility and the like in apportioning fees, as the district court did in this case.

Turner also complains that the magistrate judge *sua sponte* raised apportionment. Opp. 9 & 11 n.20. *But see infra* at 5 n. 2. Even if true, Turner does not complain that he did not fully litigate this issue in the district court. More importantly, this issue was fully litigated in the D.C. Circuit and that court unequivocally ruled – in conflict with its sister Circuits – that the district court had *no discretion* to apportion fees in the circumstances of this case – where the plaintiff suffered an indivisible injury and one defendant was immune from fee liability (here, because Turner failed to file a timely fee petition against the United States).

Finally, Turner complains that the district court did not write a comprehensive opinion when it apportioned fees. Opp. 9-10. This is irrelevant. The district court was entitled to adopt the magistrate's well-reasoned legal analysis. Again, more importantly, the Board seeks review of the decision of the D.C. Circuit ruling that the district court had no discretion to apportion fees when apportionment would result in a plaintiff receiving less than a fully compensatory fee award. This is a decision that departs from the framework of its sister Circuits.

II. The Court Should Take Account of Turner's Failure to Address Its Post-*Hensley* Decisions.

Turner relies on *Hensley v. Eckerhart*, 461 U.S. 424 (1983), in urging that the D.C. Circuit properly reversed the district court because Turner did not receive a fully compensatory fee award. Turner fails to address one other aspect of *Hensley* and this Court's post-*Hensley* decisions

ruling that a prevailing party is not necessarily entitled to such an award.

Hensley does not hold, nor has this Court ever held, that a prevailing party is entitled to a fully compensatory fee no matter what the facts. *See Hensley*, 461 U.S. at 440. Indeed, in *Hensley* itself, this Court wrote that that prevailing plaintiffs may be denied fees altogether if "'special circumstances would render such an award unjust.'" 461 U.S. at 429, quoting S. Rep. No. 94-1011, p. 4 (1976) (internal quotation marks omitted). Further, this Court has ruled that nothing in federal fee-shifting statutes gives a prevailing plaintiff "hegemony over all the other rights and equities that exist in the world," but rather that the role of the courts is to reconcile competing rights and interests. *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989). *See also Farrar v. Hobby*, 506 U.S. 103 (1992) (no fee should be awarded to prevailing party who secures only nominal damages).[1]

Despite Turner's attempts to persuade this Court to the contrary, the Board does not question that the purpose of federal fee-shifting statutes is to ensure effective access to the judicial process for persons with meritorious federal claims. Rather, the Board argues that district courts are not required to apply these statutes in a mechanistic manner, but have discretion to determine the amount of an award and whether such award should be made jointly and severally or be apportioned.

This Court has clearly ruled that district courts do have discretion to determine federal fee awards and do not have to apply a mechanistic approach to such awards.

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[1] Here, as Turner concedes, his victory was, as a practical matter, pyrrhic. Opp. 2 & 4 n.5.

Turner, however, fails even to attempt to distinguish *Zipes* and *Farrar* and instead reweighs the facts himself. His reweighing, however, does not demonstrate that the district court, with the assistance of a magistrate judge, failed to render a reasonable attorney's fee award. Indeed, the district court examined all the facts of the case, including the Board's alignment with Turner and their subsequent victory against the United States.[2]

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[2] Oddly, the D.C. Circuit, although noting that "[r]esults, not litigating positions, are determinative of prevailing party status," did not acknowledge that the Board secured "the result" it sought from the outset of the litigation and thus, that it was a prevailing party. See Pet. App. 9(a). Indeed, the D.C. Circuit stated that the Board had failed to raise in the district court the argument that it too was a prevailing party and had aligned itself with Turner. Although this did not appear to be a dispositive consideration, the record shows just the opposite, both before the magistrate judge and the district court. *See, e.g.*, Docket Entry ("DE") 50 at 2 (the Board "and plaintiff have been aligned on the substantive issues throughout the proceedings."); DE 50 at 5 (The Board "**Was a Defendant In Name Only, and Cannot Be Treated as a Defendant for Purposes of Awarding Attorneys' Fees**" (Bold in original)); DE 50 at 6 ("in considering this fee request, plaintiffs' denomination of the Board as a defendant is not controlling; rather the Court is obliged to 'look beyond the pleadings and arrange the parties according to their side in the dispute'"); DE 50 at 6 ("Penetrating the plaintiffs' nominal . . . denomination of the Board . . . as a defendant leads inexorably to the conclusion that the District of Columbia was, for all practical purposes, a plaintiff here; and, as such, it is not subject to attorneys' fees and expenses as requested . . .."; D.E. 50 at 7-8; DE 79 at 4 ("The substance is that in this litigation the plaintiffs' and the Board's interests were fully aligned on . . . [, the First Amendment,] issue and that both of these parties litigated the First Amendment issue against the United States. As this Court recognized repeatedly during this case, the Board was no more than a putative defendant."); DE 79 at 5 ("Clearly, as of November 6, 1998 the Board acted as a plaintiff in pursuing the First Amendment issue"); DE 79 at 8 ("The Board asserts that allowing the plaintiffs to recover 100% of their fees against the District, which acted through most of this litigation as a co-*plaintiff*, is so patently unfair as to constitute special circumstances." (Emphasis in original)).

Turner seeks to undermine the significance of the Board's litigating posture and success by arguing that the Board did not bring its own suit challenging the constitutionality of the Barr Amendment. This is irrelevant. The Barr Amendment was enacted on October 21, 1998. Turner filed suit on October 30 and on November 6, the Board aligned itself with Turner. On November 9 the United States entered an appearance to defend the Barr Amendment. Had the Board brought its own suit, it would have been consolidated with Turner's. The fact that the Board did not "over paper" this case does not suggest that that the district court abused its discretion in declining to hold the Board liable for fees Turner incurred as the result of the actions of the United States as intervenor. Had the United States not intervened, the case would have ended much earlier than it did, and Turner (as well as the Board) would have been spared the costs of responding to the arguments of the United States. These are facts that a district court may properly take into account in awarding attorney's fees.[3]

Here, the district court quite clearly understood the Board's position. It wrote: "The parties in this case are oddly configured. The plaintiffs and the defendant are united in their argument that the Barr Amendment is unconstitutional while the intervenor argues in favor of the Amendment's constitutionality." 77 F. Supp. 2d 25, 27 n. 1 (D.D.C. 1999). The district court also granted the Board the relief it sought, a fact not mentioned by the D.C. Circuit. The D.C. Circuit, removed from the events as they unfolded, should have deferred to the district court's "'superior

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[3] In the alternative, had the Board immediately gone forward to complete the election process, this might not have changed the litigation. The United States could have urged that the issue was one that was capable of repetition, yet evading review.

understanding of the litigation ....'" Pet. App. 8a, quoting *Hensley*, 461 U.S. at 437.

III. Review is Warranted Because There is a Square Conflict Among the Circuits Which Affects More Than One Hundred Federal Fee-Shifting Statutes.

As long ago as 1996, the Seventh Circuit recognized that its sister Circuits had ruled that "*joint and several liability is not appropriate in every case involving an indivisible injury*" and that "it may be appropriate for the district court to apportion fees between an active instigator of a wrong and a more passive codefendant who had a more peripheral or ministerial role in the wrong." *Herbst v. Ryan*, 90 F.3d 1300, 1305 (7th Cir. 1996) (emphasis added). The D.C. Circuit has now ruled to the contrary.

Turner argues that the cases cited in the Board's petition are distinguishable. They are not. All approve apportionment. Further, each of the cases the Board principally relies upon holds that the district courts have discretion to apportion fees even when apportionment results in less than a fully compensatory fee for a prevailing plaintiff because a responsible party is immune or otherwise excused from fee liability.

The central question is whether the other Circuits would have affirmed the decision of the district court here, not, despite Turner's arguments, whether the facts are precisely the same in each case. As discussed in our petition, several Circuits unquestionably would have affirmed the district court's exercise of discretion here to apportion fees.

In *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993), the court affirmed apportionment between two defendants, one federal and one state, despite the resulting failure of plaintiff to collect a full award because the EAJA (Equal Access to

Justice Act, 28 U.S.C. § 2412(d)) caps fees against the United States. The Ninth Circuit found that apportionment was mandated to ensure that the state defendant was not liable for a fee award greater than the fees incurred against it. *See id.* at 691. In rejecting plaintiffs' argument that the state defendant should be held responsible for their fees in excess of the federal cap, the Ninth Circuit explained that "this is not a case in which the plaintiffs' 'full' award has been reduced; rather, it is one in which one defendant is fully liable for the attorney fees expended against it and the other is not." *Id.* Or, put another way, "because the federal defendant is not fully liable for market rates, the plaintiffs were never entitled to a full lodestar." *Id.* at 692. As applied to this case, because the federal defendant was not liable for attorney's fees, due to Turner's failure to file a timely fee petition, Turner was never entitled to a full lodestar.

Previously, in *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981), a pre-EAJA case, the Ninth Circuit upheld a district court's decision to allocate 25% of a fee award to the immune federal defendant and 75% to the state defendant. In rejecting plaintiffs' argument that the state defendant should pay the entire award, the court explained: "This is not a case of reducing fees by 25%, but rather is a case where plaintiffs are only entitled to fees for their action as against the state defendants. Since plaintiffs are not entitled to fees for their suit against the federal defendants, they cannot recover them from the state defendants." *Id.* at 1125. Given this, the Ninth Circuit quite plainly would have affirmed the district court's apportionment here.

In a footnote, Turner attempts to dismiss the holding of *Firebird Society v. Members of the Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), by again claiming the facts are different and ignoring the heart of the

decision. Opp. 21 n.26. *Firebird Society* is squarely on point and just as squarely in conflict with the decision of the D.C. Circuit here. In that case, the plaintiff requested that the Second Circuit overturn a district court's determination that fees should not be wholly born by one defendant even where the plaintiff would not fully recover attorney's fees. The Second Circuit refused to find an abuse of discretion, noting that the defendant had made several important concessions early in the litigation and that it had joined with the plaintiff in opposing intervention by a third party to set aside a consent decree. *Id.* at 644. Indeed, it observed that the defendant municipality was as much a prevailing party as the plaintiffs. Similarly, the district court here awarded the Board the relief it sought and also underscored the Board's alignment with Turner.

In short, in each of the foregoing cases, the Circuits rejected Turner's successful argument in the D.C. Circuit -- "apportionment is required where it would deprive a fully successful plaintiff of a fully compensatory fee." Opp. 23. What Turner fails to understand is that the Circuits, up until this case, have found that the district courts have discretion to apportion fees even where the result is that plaintiff receives less than a fully compensatory fee award because a co-defendant is immune or an intervenor is excused from fee liability.

CONCLUSION

For all the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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